July 22. 1767.

ANSWERS

FOR

GEORGE MARTIN late Writer in *Edinburgh*,

TO THE

PETITION of *Margaret Michie*.

THE reſpondent believes that, in no caſe whatever, has more oppoſition been made to a proof before anſwer than in the preſent. No leſs than five bills of advocation have been preſented to your Lordſhips; one of them has been determined on a report to the whole Court, and two reclaiming petitions have been offered on the part of this petitioner. Whether this oppoſition *in initio litis*, truly proceeds from a conſciouſneſs of innocence, or a conviction of guilt, will beſt appear from the iſſue of the cauſe. Certain it is, that innocence needs not the aid of much art and induſtry to protect it: And the reſpondent will be permitted to ſay, becauſe he will ſupport it by the cleareſt evidence, that if ever an injured huſband could be juſtifiable in bringing an action of divorce againſt his

wife, it muſt be he, who, after being in his non-age ſaddled with this petitioner under the moſt unfavourable circumſtances, and thereby reduced to the neceſſity of flying from his native country, has had the mortification to find her habite and repute, with thoſe who have acceſs to know her way of life for theſe many years paſt, a common proſtitute.

The petitioner was for ſome years a menial ſervant to the reſpondent's father; and the reſpondent, being then about 18 years of age, happened unfortunately to enter into a too familiar correſpondence with her, in the courſe of which, ſhe had the addreſs to obtain from him a few lines importing a promiſe to marry her, when he ſhould attain to ſuch employment, as, independent of his friends, would make him live comfortably. This line, with a ſubſequent *Copula*, the petitioner afterwards made the ground of a declarator of marriage, which ſhe obtained before the Commiſſaries of Edinburgh.

Upon the diſcovery of this intercourſe, the reſpondent's father, then alive, offended at the diſhonour done his family, immediately turned him out of doors, ſo that for ſome time he was entirely deſtitute, and obliged to go into foreign parts to gain his bread. Since that time, being now above fifteen years ago, the reſpondent has had no other employment, than that of a clerk or book-keeper to a merchant in the Iſle of Man; and as, by the death of his father, he did not ſucceed to above L. 300 Sterling, the petitioner's aſſertion of his having ſince acquired a large fortune, as it is groundleſs in fact, muſt in itſelf appear highly improbable.

During the reſpondent's abſence, the petitioner obtained a decreet againſt him for a ſeparate aliment of no leſs than L. 50 Sterling *per annum*, a ſum which he

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was altogether unable to pay, and which, joined with his father's diſpleaſure while he lived, tended to continue him in exile from his native country. Conſidering the ſituation to which he was thus reduced, and the other circumſtances above-mentioned, it could not have been matter of much ſurpriſe, if the reſpondent had felt no great ſatisfaction in the continuance of his connection with the petitioner, but he never gave her any cauſe to complain of his conduct which he could avoid, and on the other hand, ſhe has given him too much cauſe to complain of her's.

The reſpondent's reſidence in a remote part, kept him long ignorant of the manner in which ſhe behaved during his abſence. At length however he got information, that ſhe had for a long time betaken herſelf to the lewdeſt practices, and led the life of a proſtitute.

The reſpondent did not raſhly give credit to this report, but cauſed inquiry to be made, and was thereby ſatisfied of the truth of it, altho' he was unable to diſcover the whole particulars of this ſpecies of adultery, not conſiſting of a criminal intercourſe with one or two particular favourites, but a habitual proſtitution to ſuch cuſtomers as reſorted to thoſe houſes of bad fame, which ſhe conſtantly frequented.

Your Lordſhips will not be ſurprized, that the reſpondent embraced this opportunity of delivering himſelf from a marriage ſo unſuitable and diſgraceful. He accordingly raiſed a ſummons of divorce before the Commiſſary-Court, charging the petitioner with having abandoned herſelf, for ſeveral years bygone, to obſcene and adulterous practices with men unknown to the reſpondent, and of having carnal dealings with them, in all and each of the years from 1752 to 1765 incluſive,

and

and in the months of January, February, March, and April 1766 : That, during that period, ſhe frequented bawdy-houſes as a whore or proſtitute, and as ſuch was introduced to lewd perſons frequenting the ſaid houſes in Edinburgh, town of Leith, and village of Newhaven, and that, upon theſe occaſions, ſhe and theſe unknown men were in rooms by themſelves, both in the day-time and in the night, and were ſeen and heard in poſtures, agitations, and motions, that denoted their being in carnal copulation together.

This libel was laid in as particular terms as the reſpondent's information directed, and it muſt occur to your Lordſhips, that the land-ladies and frequenters of thoſe irregular houſes, would not be inclined to diſcloſe the particular perſons with whom the petitioner was guilty, or other circumſtances that might lead to a detection thereof. At the ſame time, the reſpondent was ſo well ſatisfied of the truth of his information as to the petitioner's way of life, deſcribed in the libel, that he gave his oath *de calumnia*, upon commencement of the ſuit, in the uſual terms.

The petitioner at firſt inſiſted on ſundry frivolous objections, which ſhe made the grounds of two bills of advocation, that were ſucceſſively refuſed by two of your Lordſhips number ; and the Commiſſaries having *before anſwer* " allowed the reſpondent a proof of all " facts and circumſtances tending to ſupport the con- " cluſions of the libel, and the petitioner a proof of all " facts and circumſtances tending to elide the ſame, " and both parties a conjunct probation ;" and having likewiſe ordered an *interim* advance to be made to her of L. 5 Sterling, ſhe thereupon preſented her third bill of advocation, complaining that the libel was too vague and general as to times and places, and that the

the ſum allowed by the Commiſſaries was too ſmall. Upon report of this bill, the petitioner ſo far prevailed, that the Lord Ordinary, after adviſing with your Lordſhips, " Remitted the cauſe to the Commiſſaries, with " this inſtruction, That they ordain George Martin to " condeſcend more particularly upon the times and " places when, and where the petitioner is ſaid to " have committed the ſeveral acts of adultery libelled, " and to allow her the further ſum of L. 50 Sterling to " accompt of bygone aliment, and expence of main- " taining her defence."

In obedience to this remit, and the Commiſſaries interlocutor thereon, the petitioner got payment of the ſum allowed her; and the reſpondent, in ſupplement of the facts charged in the libel, exhibited the following Condeſcendence.

1. The purſuer, adhering to his libel, condeſcends, and ſays more particularly, that Margaret Michie the defender uſually frequented public bawdy houſes, and houſes of bad fame: That ſome years ago, ſhe lodged in and frequented Archibald Lyle's houſe in Peebles wynd, known by the name of Lucky Lyle's, and proſtituted herſelf to, or had carnal dealings with, other men than the purſuer in that houſe; and afterwards had carnal dealings with other men than the purſuer in the houſe of the ſaid Archibald Lyle in Abbay-hill, and in the houſe of Jean Mill in Canongate, who lives now in Toddrick's wynd; and particularly, had ſuch carnal dealings with Alexander Goodſman reſidenter in Leith.

2. That in the years 1764 and 1765, ſhe lodged for the moſt part of theſe years in the houſe of William Chalmers journeyman printer in Cowgate, and proſti-

tuted herſelf to ſeveral perſons in her room in that houſe, and lay naked in bed with men, other than the purſuer, all night very often.

3. The defender, upon one or other of the nights of December 1765, or November preceding, lodged all night in the houſe of John Lawrence in Leith, and bedded that night with a man other than the purſuer.

4. The defender alſo lodged for ſeveral nights, in the months of November and December 1765, or January 1766, in the houſe of John M'Laren in New-Haven, and bedded there, for one or more nights, with a man known not to be the purſuer.

To this condeſcendence anſwers were made for the petitioner; upon adviſing which, the Commiſſaries pronounced this interlocutor: " *Before anſwer, allow the*
Mar. 18. 1767. " *purſuer a proof of the facts ſet forth in his libel and conde-*
" *ſcendence, and of all the other facts and circumſtances tending*
" *to ſupport the concluſions of his ſaid libel, and allowed the*
" *defender a proof of the facts ſet forth in her anſwers to ſaid*
" *condeſcendence, and all other facts and circumſtances tending to*
" *elide the libel; and allowed both parties a conjunct probation*
" *in the premiſſes.*"

Of this interlocutor the petitioner complained in a *fourth* bill of advocation, which was *refuſed* by the Lord *Kaimes* Ordinary, upon adviſing the ſame with anſwers. The reſpondent's doers were then in hopes of proceeding in the proof, but were ſtill diſappointed, as the petitioner obtained a ſiſt upon a fifth bill, in order to her reclaiming; and accordingly, ſhe preferred a petition to your Lordſhips againſt the Lord Kaimes's interlocutor; but, upon adviſing her petition, with anſwers,

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your Lordſhips were pleaſed upon the 4th July inſtant, to *refuſe the petition, and adhere to the Lord Ordinary's interlocutor.*

Againſt this laſt interlocutor the petitioner has again reclaimed, and inſiſts that the proof ſhould be reſtricted to the two laſt articles of the reſpondent's condeſcendence, *viz.* the acts of adultery ſaid to have been committed in December 1765, in the houſe of John Lawrence in Leith, and thoſe committed in November and December 1766, in the houſe of John M'Laren in New-Haven.

This petition now to be anſwered, contains nothing material, further than what was ſtated in the former petition; but, on the contrary, the petitioner ſeems now to have given up an argument which ſhe formerly inſiſted on, drawn from the preciſion requiſite in criminal indictments, to which ſhe endeavoured to aſſimilate a libel of divorce before the Commiſſaries. The ſubject of her complaint is, however, ſtill the ſame, and reſolves into this, 1*mo*, That the condeſcendence exhibited by the reſpondent, is too general, excepting as to the two laſt articles: And 2*do*, That no proof ſhould be allowed under the general accuſation in the libel, of facts and circumſtances tending to prove the adultery therein charged.

If the reſpondent rightly apprehends the tendency of the petitioner's argument, it would, if ſucceſsful, go the length, not only of totally altering the ordinary method of proceeding in proceſſes of this kind before the Commiſſary Court, but even of aboliſhing that ſalutary remedy of divorce in caſes of adultery, by rendering the obtaining it almoſt impracticable. The petitioner is forced to admit, that, by the conſtant and immemorial

rial practice of the Commiſſary Court, libels upon the head of adultery charging the offence in general terms as to time, place, and perſons, ſuch as is here uſed, have been ſuſtained, and proofs at large before anſwer been allowed, without ſpecial condeſcendences being required upon the part of the purſuer. The petitioner indeed would have this to have proceeded from the paſſiveneſs of the defenders; but the reſpondent apprehends, that it muſt be imputed to the plain nature of the ſubject of trial. Adultery is not an act to which the guilty party calls witneſſes to be preſent, or in which there are many accomplices. It is always endeavoured to be concealed from the knowledge of the party injured; and when it happens to be diſcovered, the information received is generally imperfect as to times and places, and often as to perſons. This being ſo, a purſuer, tho' ſatisfied of the injury received, and in expectation of bringing it out on proof, cannot be able to ſet forth in his libel the particular times and places where the crime was committed, or even the perſons with whom it was committed; and conſequently, if a ſpecial condeſcendence ſhould be required, and the proof limited to the facts ſo ſpecially mentioned, it would in moſt caſes reſolve to a denial of juſtice, or an abſolute bar to the purſuer's proceeding in his action.

If this would be ſo, where a wife living in family with her huſband proves unfaithful to his bed, and has criminal correſpondence with particular favourites, *a fortiori* would the rule be hard, when a huſband, like the petitioner, happens to be reſiding for many years in a foreign country, and where his wife in his abſence, inſtead of entertaining one or two gallants in her houſe, reſorts to bawdy-houſes and places of proſtitution,

ſtitution, which ſhe habitually frequents for a courſe of years, and follows the trade and practice of proſtituting herſelf to every unknown perſon who happens to reſort to ſuch houſes. How is it poſſible for a huſband, tho' thus injured and diſgraced to the higheſt degree, to be able to tell every particular perſon who lies with his wife, every houſe, every night or day in which ſhe commits that reiterated and habitual crime? At the ſame time, your Lordſhips will certainly be of opinion, that no kind of adultery is ſo injurious and deſerving of puniſhment, as that which conſiſts in common and habitual proſtitution.

Beſides, in ſuch a caſe as the preſent, where moſt of the witneſſes muſt neceſſarily be the aſſociates and companions of the guilty perſon, it is natural to ſuppoſe, that they will not be very forward in diſcloſing the ſecrets of their trade, and the cuſtomers reſorting to their houſes, until they are compelled. In fact, the reſpondent has found them extremely reluctant to ſpeak out particulars, altho' he has received ſuch general information as has ſatisfied him of the juſtneſs of his action, and enabled him to exhibit the above condeſcendence.

The reſpondent, however, has no occaſion to diſpute, that although, by the uniform practice of the Commiſſary Court, ſummonſes of divorce are laid in ſuch general terms as thoſe uſed in his libel, yet purſuers ſhould condeſcend upon particulars, when required, as far as they are able. All that he contends is, that impoſſibilities ſhould not be required of a purſuer: That a condeſcendence ſhould not be demanded more particular than the purſuer can give; and that, when a condeſcendence is exhibited, ſuch as the information obtained can produce, the purſuer ought not to be limited

mited or cramped in the proof, ſo as to prevent a full diſcovery of facts that may ſupport the libel, although not known to, or condeſcended upon by the purſuer, at the time the proof is allowed.

Agreeable to what the reſpondent here maintains, he does now aver, as he formerly did, that the condeſcendence exhibited by him, contains all the particulars as to time, place, and perſons, which he is able to ſet forth. This being ſo, were your Lordſhips to make it a preliminary condition of his being allowed a proof, that he ſhould ſtill condeſcend more particularly, it would be annexing an impoſſible condition, and thereby operate an abſolvitor to the petitioner, in one of the moſt flagrant and ſhameful adulteries that ever was made the ſubject of a proceſs of divorce. Or, on the other hand, ſhould the petitioner be allowed to garble the libel and condeſcendence, and to reſtrict the proof to one or two articles, which the reſpondent has happened to diſcover more particularly, it would be a departure from the uniform practice in ſuch caſes for time immemorial, and would have the direct tendency of ſtifling the evidence of the petitioner's guilt, merely becauſe her injured huſband has not been yet able to trace her through the whole paths of vice in which ſhe has trode for theſe many years paſt, while he was abroad.

Your Lordſhips will know, that, for enabling the public proſecutor to ſet furth, with preciſion, the circumſtances of crimes criminally tried, precognitions are uſually taken, whence the particulars as to times, places, and perſons, may be diſcovered. But, in a caſe ſuch as the preſent, no precognition could be legally taken, to ground a proſecution *ad civilem effectum*.

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What then is an injured huſband to do, if he is not at freedom to apply to the proper court for relief, upon getting ſuch general information, ſupported by habite and repute, as affords to himſelf conviction of the wrong done him? If the witneſſes will not ſpeak out of their own accord, or if the crime is of that nature to have been repeated, for years together, with all thoſe who frequented the places of the guilty perſon's reſort, it muſt, in the nature of things, be impoſſible for him to exhibit a minute detail: Yet, becauſe he cannot do ſo, ſuch is the tendency of the petitioner's argument, that the guilt muſt be ſtifled and concealed, and he, and every other perſon in the like unfortunate ſituation, muſt be left without remedy, and thereby ſuch criminal practices eſcape with impunity.

At the ſame time, the reſpondent's condeſcendence is far from being ſo general as the petitioner would repreſent it. Your Lordſhips did not ordain him to condeſcend as to the *perſons*, becauſe there was not the leaſt ground to believe that he knew thoſe perſons. And as to the *times* and *places*, he has firſt condeſcended on the houſe of Archibald Lyle in Peebles Wynd, thereafter in the Abbay-hill; and conſequently the adulterous practices, charged to have been committed in theſe houſes, muſt have happened while Lyle kept them in thoſe places. And, in the anſwers to the laſt petition, the reſpondent, by further information, was enabled to ſet forth, that Lyle's reſidence in Peebles Wynd, was from Whitſunday 1762 to Whitſunday 1763; and from that laſt period, till now, in the Abbay-hill. The petitioner, indeed, is pleaſed to obſerve, that, before the ſiſt was obtained, Lyle and his wife were examined, and ſeverally deponed *nihil novit*, which

which ſhe ſays diſproved in effect this firſt article: But the evidence upon it cannot be confined to their oaths; and the reſpondent has cauſe to complain, that their depoſitions were not taken down as emitted, ſeeing they confeſſed their acquaintance with the petitioner and her reſorting to their houſe, which is a noted one in the conſtables books; but alledged ignorance of her adulterous practices while there.

The ſecond houſe condeſcended on is that of Jean Mill in the Canongate, now reſiding in Todderick's Wynd; and though the reſpondent has not been able to learn the particular period that Mill removed from the firſt of theſe houſes to the other, this cannot be unknown to the petitioner, if ſhe frequented either of theſe houſes; and the witneſſes, particularly thoſe of Mill's family, will no doubt ſpecify, upon their examination, the periods of her reſidence in thoſe different houſes within the time libelled.

The third houſe condeſcended on is that of Mrs Japp, while ſhe lived in the Abbay, and thereafter in Edinburgh, where ſhe is ſaid to have reſided for three years preceding Whitſunday 1766.

And the fourth houſe is that of William Chalmers in the Cowgate; where it is ſet forth, that the petitioner lodged for the moſt part of the year 1764 and 1765.

The other two remaining articles of the condeſcendence, as to the petitioner's adultery committed at Leith and Newhaven, are allowed by the petitioner to be ſufficiently explicit; and therefore, the reſpondent humbly apprehends, that the petitioner has not the leaſt colour for complaining of the Commiſſaries for admitting the whole thereof to proof.

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The petitioner's argument for requiring a ſtill further condeſcendence, or reſtricting the proof to the two laſt articles of the one already exhibited, proceeds altogether upon a ſuppoſition of there being here an affected latitude in the reſpondent's allegation ; whereas the reverſe of this is the caſe. The reſpondent has already condeſcended, as particularly as he can do, and more could not be reaſonably required of him. The petitioner acknowledges, that it is not cuſtomary in the practice of the Commiſſary Court, to require any condeſcendence whatever, even though the libel is laid in general ; and although your Lordſhips, in a late well-known caſe, appointed the purſuer to condeſcend more particularly, with reſpect to the perſons with whom he alledged the defender to have been guilty of the crime libelled ; yet it will be remembered, that the cauſe thereof, was the purſuer's having judicially acknowledged, that he ſuſpected the guilty perſons, and having deſcribed their dreſs, ſtature, and complexion. This rendered it juſt that the defender ſhould be informed of what the purſuer owned he already knew. But no argument can be thence drawn to the preſent caſe, when, from the very nature of the crime, and manner of its commiſſion, the reſpondent has not acceſs to know the like particulars.

What the petitioner obſerves with regard to a man who has committed adultery, being barred from inſiſting againſt his wife for a divorce on account of adultery, ſuppoſing it to be good law at preſent, which the reſpondent greatly doubts, is quite foreign to this caſe where the reſpondent is not accuſed of that crime. The petitioner too cannot be ſerious in the concluſion ſhe draws from the reſpondent's neceſſary abſence for

ſo many years, as if that alſo afforded a bar to the action. It is a pretty extraordinary doctrine, that when a huſband happens to leave his wife, or go abroad for any length of time, ſhe ſhould have *ipſo facto* a full diſpenſation to commit adultery with impunity, or even to become a common proſtitute. The reſpondent's abſence, inſtead of affordiug any ground for laying him under an extraordinary reſtraint, or compelling him to be more ſpecial than ordinary in his facts, affords the ſtrongeſt reaſon to the contrary, as it is owing to it, joined with the petitioner's habitual practice of lewdneſs in the manner libelled, that the reſpondent cannot condeſcend more ſpecially than he has already done.

It only remains to take notice of the petitioner's other ground of complaint, *namely*, the Commiſſaries allowing a proof not only of the condeſcendence, but of the libel and other facts and circumſtances for ſupporting or eliding the ſame. This is no more than has been done in every caſe of the kind that has occurred before the Commiſſary-court, and is likewiſe agreeable to the practice of the ſupreme Courts of Seſſion and Juſticiary, which, in proofs before anſwer, always allow parties to prove, not only the facts ſpecially condeſcended upon, but all other facts and circumſtances relative to the matter in diſpute. This in particular was done in the great cauſe of Douglas.

It will occur to your Lordſhips. that, in moſt caſes where proofs are allowed, it muſt be impoſſible to aſcertain before hand what facts and circumſtances may be material to the iſſue. Parties may diſcover facts during the taking of the proof, and nothing is more common than for material circumſtances to come out *incidenter*, and be diſcloſed by the witneſſes anſwers regarding

ing other facts ; and it would be the greateſt hard ſhip, if a witneſs's mouth were to be ſhut, or the party ſtopt from inveſtigating what might be concluſive, merely becauſe he happened not to have known it ſooner, and ſpecially condeſcended upon it. Indeed, if a party ſhould, under colour of ſuch a proof being allowed, attempt to prove matters altogether extraneous, the other party might have cauſe to complain, and might get a ſtop put to ſuch examination ; but that affords no reaſon for circumſcribing the interlocutor allowing the proof, as it muſt be preſumed, that no party will attempt to prove what is entirely foreign to the cauſe.

The reſpondent, too, humbly apprehends, that, in ordering a condeſcendence in this cauſe, your Lordſhips did not mean to have the proof limited to the facts therein ſet forth, nor did your Lordſhips interlocutor bear ſuch limitation. The purpoſe of the condeſcendence is to give the other party ſuch particular information, with regard to what is intended to be proved, as the purſuer is able to afford. But when that is done, and the libel as well as the condeſcendence is relevant, it is reaſonable and juſt, that a proof at large ſhould be allowed. Accordingly, the Commiſſary's interlocutor now complained of, is in the ſame ſtile and form according to the reſpondent's information, with thoſe pronounced in all other caſes, even where a general libel was followed with a particular condeſcendence.

Nor can a caſe well occur, where ſuch interlocutor can be more proper than the preſent. When a divorce is ſued againſt a wife for particular acts of adultery committed with one or two perſons, known to, or ſuſpected by the purſuer, the limiting the proof to theſe acts, or to facts and circumſtances reſpecting them, might be

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attended with no prejudice to the purſuer. But when a wife has, for a courſe of years, been in the habitual practice of proſtitution to all cuſtomers indiſcriminately, which is the charge here exhibited, it is obvious, that, in the courſe of the proof, as to the acts commited in one place, or at one time, diſcovery may be made of other criminal acts committed at another time and place. It is a common queſtion in proceſſes of divorce, Whether the witneſs knows the party accuſed to have had carnal dealings with perſons, not the injured huſband or wife? If ſuch queſtions ſhould be here anſwered in the affirmative, and the witneſs, upon being deſired to tell when and where, ſhould mention a time, a place, different from any condeſcended on, though within the bounds of the libel, it would ſurely be hard to ſuppreſs that evidence; and yet ſuch is the tendency of the petitioner's plea.

In fine, as the hardſhip of limiting the proof, further than the Commiſſaries have done it, and your Lordſhips have already approved, would be great upon the reſpondent; ſo the proof as allowed, can be attended with no real hardſhip to the petitioner. The diets of the Commiſſary-court are not peremptory, as thoſe of the Court of Juſticiary. The petitioner will have the ſame benefit as to a proof of *alibi*, or other relevant defence, from hearing what the witneſſes ſay, when regularly examined, as if the whole facts proved by them were antecedently condeſcended on. She will get from that information as to times and places, which the reſpondent is at preſent unable to give her; and if any new facts come out, ſhe will have full time allowed for bringing any proper evidence ſhe can adduce in her defence againſt them.

In reſpect whereof, &c.

DAV. RAE.